UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

JACOBS FARM/DEL CABO, INC.

and Case 20-CA-31905

GILBERTO MOYA, An Individual

Robert Guerra and Jill Coffman, Attys.
NLRB Region 20, San Francisco, CA.,
for General Counsel.

Robert M. Cassel, Atty., Mill Valley, CA,
for Respondent.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. Gilberto Moya (Moya), an individual, filed an unfair labor practice charge on May 24, 2004, alleging that his termination by Jacobs Farm/Del Cabo, Inc. (Respondent or Company) on December 11, 2003, violated Section 8(a)(1) of the Act.[1] Based on that charge and a charge filed by another individual, the Regional Director for Region 20 issued an order consolidating cases, consolidated complaint and notice of hearing on August 31. Respondent filed a timely answer on September 3 denying that it engaged in the unfair labor practices alleged. As the parties subsequently resolved the allegations arising from the other case (20-CA-31912, formerly 32-CA-21385), the Regional Director issued an order severing cases on November 5 so that the issue here pertains solely to Moya's case.[2]

I heard this matter on November 8 and 9, 2004, at San Francisco, CA. At the hearing the parties were provided the opportunity to examine and cross-examining witnesses, introduce relevant documentary evidence, advance argument about issues, and file post-hearing briefs. After carefully reviewing the entire record taking into account the demeanor of the witnesses, and after considering General Counsel's brief, and Respondent's brief and detailed, proposed findings of fact, I hereby make the following

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[1] The relevant events occurred in 2003. Dates shown below without reference to a calendar year are in 2003.

[2] The case caption above has been amended to reflect the severance. The transcript and exhibit covers are hereby corrected to reflect the correct case caption shown above. Where the transcript is cited, the page number is preceded by "T" and the transcript line number(s) on the cited page follow the colon symbol. General Counsel's exhibits have been cited as GC Exhibit [number]; Respondent's exhibits are cited as R Exhibit [number].

Findings of Fact

I. Jurisdiction

Respondent, a California corporation with a facility in South San Francisco, California, is engaged in the business of farming and wholesale sale and distribution of organic produce. During the 2003 calendar year, Respondent sold and shipped goods valued in excess of $50,000 from its South San Francisco facility directly to points located outside the State of California. Based on the foregoing, I find the Board has jurisdiction to resolve this labor dispute.

II. Alleged Unfair Labor Practices

A. Credibility

The findings below reflect credibility resolutions I have made after carefully considering "the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, in sum, all of the other variant factors which the trier of fact must consider in resolving credibility." *Northridge Knitting Mills, Inc*., 230 NLRB 230, 235 (1976). In addition, I have considered the clues I gained about the "trustworthiness of testimony" based on my observations of the witnesses during the hearing. *NLRB v. Dinion Coil Co*., 201 F.2d 484 (2nd Cir. 1952). Evidence contrary to my findings below has been considered but it has not been credited. However, with respect to the decisive issue, i.e., did Moya quit his employment or was he fired, I have recounted the essential evidence adduced by both sides and provided a detailed rationale for my credibility resolution in the subsection C.

B. Relevant Facts

As noted, the Company wholesales organic produce, much of which it grows on its own farms located near Pescadero and Santa Cruz, California. In addition, it operates packing operations in Los Angeles, Pescadero, and, more recently, South San Francisco, the only facility involved in this dispute. The Company opened its South San Francisco (SSF) packing operation in May 2003. There, it packs herbs grown on its farms and prepares tomatoes for shipment under its Del Cabo label. From May to early December, the SSF work force grew to approximately 40 employees (overall, the Company employs about 100 persons) directly supervised by two line supervisors, Pedro Nunez on the herb side and a man named Tito on the tomato side. Both line supervisors reported directly to division manager Kurt Jacobsen who divides his time among several locations. In addition, well before December, human resources manager Lissett Ortega moved her office from the Pescadero headquarters to the SSF facility apparently so she could oversee the implementation of a food safety certification program.

The Company hired Moya in December 1999 as a picker in its Pescadero fields. Later, he transferred to the Pescadero packing shed and then, along with several other Pescadero employees, to the new SSF packing shed when it opened. At the SSF operation, Moya's job duties included packing herbs, preparing shipping labels, and otherwise serving as line supervisor Nunez' assistant. Company officials acknowledged. Moya's competence as a worker; he never received any disciplinary notices during his tenure. Instead, he received three pay increases based mainly on his increased responsibilities.

For scheduling purposes, the SSF work force has been administratively divided into six production groups. Although the SSF packing shed operates six days a week, employees ordinarily work only five eight-hour days. Those who worked at the Pescadero packing shed

had longer hours. About a week before the SSF packing shed opened, Jacobsen and Ortega met with the Pescadero employees being transferred. Moya claims that Ortega told the employees that, as they would only be working 40 hours per week, their wages would be adjusted so that they would earn more or less the same as they had at Pescadero.

The Company utilizes a progressive disciplinary system. The initial step involves a documented verbal warning. Absent improved behavior or in the event of additional misdeeds, the policy provides for a written warning as the second step, then a suspension as the third step, and finally discharge. When it becomes necessary to discharge an employee, Company officials prepare the employee's final check along with a packet of materials pertaining to benefits and unemployment insurance in advance of meeting with the employee. However, over the past few years, the Company has discharged no more than five employees.

By early December, Jacobsen concluded too many of line supervisor Nunez' personal problems had "filtered into the packing shed," and that his crew's efficiency left much to be desired. On this latter point, Jacobsen believed that Nunez failed to properly control his crew's horseplay or otherwise discipline them particularly when they ignored or overlooked the Company's mandatory food handling regulations. After consulting with Ortega and Larry Jacobs, the Company's owner, Jacobsen terminated Nunez on December 10 and replaced him with Cecilio Rodriguez. Moya felt quite angry about the Nunez termination because he considered Nunez to be a good friend. T94: 10-20.

After the lunch period the following day, Jacobsen and Ortega conducted a series of separate meetings with each SSF production group that lasted about 20 minutes in order to explain some of the reasons for Nunez' departure, to announce Rodriguez' appointment, to discuss the Company's expectations, and to deal with other independent matters. Jacobsen and Ortega chose this small group format because of the limited space available in the break room on a mezzanine overlooking the SSF production floor. This circumstance seemingly dictated prior small group meetings at SSF whereas Company officials usually met with the entire employee contingent when the need arose at the Pescadero facility. [3]

When the time came for his production group, Moya failed to show up for the meeting. Because they deemed the meetings to be important, Jacobsen and Ortega went to Moya's work area to remind him of the meeting. During an ensuing angry exchange, Moya told the two managers that he disagreed with their choice of conducting the meeting in the small-group format. Moya felt that the employees would most likely speak up if all attended the same meeting because "[w]e all give our support to the person who's speaking when we are in a group." By contrast, he said, "[w]hen the group is small nobody says anything." T62: 4-15. He asked Ortega if she feared holding a meeting with the entire group. T63: 18-24. According to Moya, Ortega told him that she did not fear anyone and that he changed his mind about attending after Ortega told him he should go "upstairs" if he had anything to say. T64: 1-3. Moya claims that he finally decided to go to the meeting so he could complain about the Company's failure to increase salaries and grant vacations as earlier promised. T65: 7-9.

Ortega conducted the meeting in Spanish using an agenda Jacobsen and she prepared in advance. When she began addressing some of the reasons the Company terminated Nunez, Moya interrupted and became argumentative because he could not "understand why a long time employee would be let go." T31: 6-16. When Ms. Ortega talked about improving crew

[3] According to Santiago Hernandez, the small group meetings started when the Company opened the SSF facility. T98: 8-18.

efficiency, Moya interrupted and told her that she should speak individually with those who were not working efficiently. T74: 7-21. He also told her that the Company wanted the employees to work harder but they but they had not given the wage increases that had been promised. T76: 4-20. Jacobsen responded that they could not give any increases because they were operating in the red but they would see what could be done about it. T78: 12-22; T92: 6 – T93: 1. Moya accused the Company of breaking the promises made earlier about the pay increases. When Ortega told the group that they needed to cut out the excessive talking and shouting, Moya told her that the employees had to communicate so they would know what they were doing there. T75: 11-18. When Ortega spoke about the need to wear hairnets and aprons in compliance with the safe food handling rules (some employees had already been disciplined for failing to do so), Moya interrupted and told her that she should set an example by wearing a hairnet herself when she came onto the production floor. T73: 15 – T74: 1. Although Jacobsen and Ortega both asked a couple of times that he stop interrupting so they could finish the agenda and then deal with any questions and comments, Moya's interruptions continued. According to Ortega, Antonio Nunez, former line supervisor Nunez' brother, and Hernandez told Moya, in effect, to calm down because he was making a fool of himself. Moya denied that any of his co-workers cautioned him.

During the first ten minutes of the meeting, Ortega had only gotten through about two items on her seven-item agenda because of the Moya's interruptions. At that point, Ortega told the group that if anyone needed support or had a complaint, she was there to help them. Moya laughed at her statement to signify that he did not believe her. T80: 8-16, T112: 5-8. When Moya laughed, Ortega turned to Jacobsen in exasperation and told him that she could not deal with Moya any further. T81: 5-8. Jacobsen claims that he told Moya in Spanish, "Yo no quiero tu auqui no mas." T229: 18-19. In English that means, "I don't want you here anymore." T36: 1-2; T230: 4. Moya claims that Jacobsen told him, " Mr. Moya, this is your last day of work." T80: 24-25. Jacobsen emphatically denied that he made any such statement. T175: 7-16. Santiago Hernandez first recalled that Jacobsen told Moya, "[N]o more, Mr.Moya, leave." T113: 2-10. When pressed further by counsel for General Counsel, Hernandez claimed that Jacobsen told Moya "[t]o get out and leave, no more in this company." T113: 19 - T114: 2.

Moya gathered some belongings from a nearby locker and left. After going half way down the mezzanine stairs, he returned to the break area and told Ortega, according to her, "I want my check. You need to give me my check now." T226: 23-25. Ortega told him that the checks were cut at the Pescadero office and that if he wanted his check he could go there for it or it could be mailed it to him. Moya told her to mail it and then he left. T227: 2-5. For his part, Moya admits that he ask for his check. He said he did so because "it was an immediate termination" (T81: 11-15) but nothing in his testimony demonstrates that referred to having been terminated when he ask Ortega for his check. Regardless, Moya denies that he quit his job. T81: 19-20. However, Hernandez claims that Moya asked Jacobsen and Ortega for his check because "they were terminating him." T113: 13-15.

After she completed the meeting, Ortega retrieved Moya's time card and telephoned the payroll clerk at the Pescadero office to set the check preparation and mailing process in motion as Moya requested. Ortega never saw Moya around the plant or in the parking lot after the meeting. He had not punched out on his time card for the day. She never heard from him or saw him again after the meeting nor did she ever have any contact from Moya or anyone on his behalf. Likewise, Jacobsen never heard from Moya after the meeting.

About a week later, Ortega learned that the paycheck that had been sent to Moya had been returned because of an incomplete address. Following her investigation of the returned mail problem, Ortega prepared the usual packet of materials to mail with Moya's final check.

These materials included a COBRA application for the continuation of his health insurance, a California Employment Development Department (EDD) notice about unemployment benefits, and a change of status notice. The latter states, "You were terminated December 11, 2003." GC Exhibit 3(a)(Spanish language version sent to Moya) and 3(b)(English translation provided to the tribunal.) Ortega drafted the change of status notice from a form in her office. She felt that it fit the circumstance by then because, in her view, Moya had abandoned his job by failing to report for work or call in for three consecutative days as Company policy requires. Ortega never received a notice from EDD that Moya filed an unemployment compensation claim with that state agency and the General Counsel adduced no evidence that he actually did.[4]

Jacobsen claimed that Moya merely asked for his check when he returned to the meeting and that Ortega responded. He denied that Moya made any reference to having just been terminated. T175: 21-25. According to Jacobsen, Ortega told Moya that "we can't cut a check on the spot, because we don't have the checks at the warehouse." She told him if he really wanted his check he had to go to Pescadero to get it and that she would arrange for them to prepare it for his pickup or mail it to him. T172: 2-8. Jacobsen never saw or heard from Moya after that and he made no attempt to contact him because he thought Moya had quit. T172: 18 – T173: 11.

C. Further Findings and Conclusions

Section 8(a)(1) prohibits employers from interfering with, restraining or coercing employees for exercising their Section 7 rights. The portion of Section 7 pertinent here gives employees the right to engage in concerted activities "for the purpose of . . . mutual aid or protection." An employer violates Section 8(a)(1) by discharging an employee for engaging in protected concerted activity. *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962).

The General Counsel argues: (1) that Moya engaged in protected concerted activity at the December 11 meeting; (2) that he did nothing during the meeting that would cause him to lose the protection of the Act; and (3) that Respondent terminated Moya at the December 11 meeting for engaging in protected activity. As for Respondent's primary contention that Moya quit, General Counsel argues that the "words used by Respondent at the December 11th meeting would clearly be understood as advising Moya he was terminated." Further, General Counsel contends that Respondent's officials failed to disabuse Moya that he had not been fired, and that the letter Ortega later set to Moya with his final check supports the claim that Respondent, in fact, terminated Moya. From the General Counsel's perspective, Ortega's "termination" letter makes this case factually parallel to the Huembes allegations addressed by the Board in *RC Aluminum Industries*, 343 NLRB No. 103, slip op. at 1-3 (December 8, 2004).

Aside from its principal contention that Moya quit his employment, Respondent argues: (1) that Moya engaged in no protected activity at the December 11 meeting; and (2) that, even if he did, Moya's discharge would have been justified due to the abusive and offensive nature of his conduct at the December 11 meeting. Respondent sees no relevance in the *RC Aluminum* case to the issues in this case.

[4] During Jacobsen's cross-examination, counsel for General Counsel probed the general industry employment prospects in December in an apparent, but inconclusive, effort to blunt any inference that Moya quit his employment the Company. T189: 8 – T190: 7. In view of this effort, I find the failure of the General Counsel to rebut Ortega's assertion that she never saw any paperwork related to an unemployment insurance claim by Moya merits the inference that, in fact, Moya never filed such a claim.

Based on the parties' arguments, I have concluded that this case does not involve a question of mixed motive that would bring the Board's *Wright Line*[5] analytical model into play. *Honda of America, Mfg*., 334 NLRB 751, 753 (2001). I have likewise concluded in agreement with Respondent that Moya quit his employment. The credible evidence shows that Jacobsen merely asked Moya to leave the meeting because his interruptions prevented Ortega from completing her agenda. I do not credit claims by Moya or Hernandez that Jacobsen used words at that time which would convey the meaning that he was terminating Moya.

Concededly, the fact of discharge does not depend on the use of formal words of firing. It is sufficient if the words or actions of the employer would logically lead a prudent person to believe the employment relationship had been terminated. *NLRB v. Trumbull Asphalt Co*., 327 F.2d 841, 843 (8th Cir. 1964). Applying *Trumbull Asphalt's* prudent-person standard here, the following factors support the conclusion that Jacobsen did not fire Moya: (1) Jacobsen's request that Moya leave, which I credit, contains no unequivocal words terminating Moya's employment; (2) the pre-meeting pleas by Jacobsen and Ortega to attend the meeting lends support for the conclusion that Jacobsen's words only sought to cancel the earlier request that he attend the meeting; (3) Moya's numerous, argumentative interruptions at the meeting makes it very improbable, in my view, that he would have had no immediate, hostile rejoinder if he actually perceived that Jacobsen had just discharged him; (4) the uncontradicted evidence that Respondent does not make a practice of summarily terminating employees, especially in public, supports a finding that Jacobsen did not discharge Moya at the meeting in front of other employees; (5) Moya's claim that he demanded his check immediately because he had been terminated struck me as contrived and incredible when he testified; (6) Hernandez' assertion that Moya referred to his termination when he ask for his check is not consistent with Moya's testimony; (7) the lack of any evidence that Moya filed an unemployment insurance claim is consistent with the conclusion that he quit his employment, particularly where, as here, the Company sent him information about his right to do so. In sum, Moya's persistent refusals to heed the repeated and reasonable requests to quit interrupting until Ortega finished do not favor a reasonable conclusion that Jacobsen intended to fire Moya by his bare statement that he was not wanted "here anymore."

I find General Counsel's reliance on Ortega's termination letter sent after Moya's check had been returned and the Board's decision in the Huembes portion of *RC Aluminum* case unconvincing. In *RC Aluminum*, the employer argued that the ALJ erred by relying on a document contained in Huembes' personnel file containing the notation "Termination 11/16/00" to conclude that his supervisor discharged Huembres rather than that Huembres quit his employment as the employer claimed. The panel majority concluded that the ALJ properly admitted and relied on the disputed document without regard to its potential hearsay nature because other evidence (Huembres' credited testimony) served to corroborate the termination notation in the document. Pointing to *Meyers Transport of New York*, 338 NLRB No. 144, slip op. at 12 (2003) and the cases cited there, the panel majority found this approach consistent with the Board's lengthy practice of admitting hearsay if "rationally probative in force and if corroborated by something more than the slightest amount of other evidence." Thus, Humbres' supervisor had also told him ". . . I can fire people. . .[j]ust like I am firing you, I can fire anybody, because I don't believe in the Union."

Although GC Exhibit 3b contains a similar notation, the termination reference on GC Exhibit 3 does not deserve the probative weight counsel for General Counsel seeks or that the

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

panel majority accorded to a similar notation in *RC Aluminum.*[6] Jacobsen's remark to Moya following the latter's numerous interruptions at the meeting ("I don't want you here anymore.") stands in stark contrast to the remark ("I am firing you") made by Huembres' supervisor in *RC Aluminum*. The reasonable inferences permitted from these vastly different remarks stand at opposite ends of the spectrum. Despite the notation made on Moya's termination notice many days later, I find that Ortega's formal separation letter served only to provide a neutral notice that Moya's employment had ended. Jacobsen did not summarily discharge Moya during the December 11 meeting as counsel for General Counsel argues.

In the alternative, I would find, contrary to Respondent, that Moya engaged in concerted activity by raising various issues of moment to all employees both immediately before the December 11 meeting (questioning why the Company would not conduct a plant-wide meeting) and later at the meeting. There, Moya criticized Ortega for engaging in a broad, public assault on employee efficiency rather than addressing efficiency problems with particular offenders, and her own failure to adhere to food safety certification standards on the plant floor while personally disciplining employees for exactly the same conduct. In addition, at least one employee remembered Moya engaged in a heated argument with Jacobsen over the Company's failure to provide the equalizing pay increases purportedly promised to employees transferred from Pescadero to SSF while badgering employees to be efficient. Respondent's contention that these activities by Moya were personal as opposed to concerted in character lacks merit. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). In the context of a group meeting, a concerted objective may be inferred from the circumstances. *Cibao Meat Products*, 338 NLRB 934 (2003), and the cases cited there.

However, the evidence shows that Moya dismissed repeated admonitions from Jacobsen, Ortega, and perhaps other employees, to quit interrupting the meeting until Ortega finished her presentation. His refusal to do so caused a serious and unnecessary disruption. Although an employee's "right to engage in protected activity permits some leeway for impulsive behavior, this must be balanced against an employer's right to maintain order and respect." *Woodruff & Sons, Inc*., 265 NLRB 345, 347 (1982). By ignoring the reasonable requests to allow Ortega to complete her planned agenda as she had done for all the other production groups, even in spite of repeated assurances that his comments would then be entertained, I find that Moya engaged in disruptive behavior sufficient to lose the protection the Act would otherwise afford his activities at the meeting. *J.P. Stevens & Co., Inc. v. N.L.R.B.*, 547 F. 2d 792, 794-95 (4th Cir. 1976).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), 2(6) and 2(7) of the Act.

2. Respondent did not engage in the unfair labor practice alleged in the complaint dated August 31, 2004.

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[6] The issue in *RC Aluminum* arose in the context of the employer's exception on hearsay grounds. No hearsay question exists here. I admitted GC Exhibit 3b (and its Spanish language counterpart, GC Exhibit 3a) because the counsel for General Counsel offered it through its author, Ms. Ortega. But even if the potential for a hearsay problem existed, Respondent obviously waived any hearsay objection by failing to object. (T41) *NLRB v. Cal-Maine Farms, Inc*., 998 F.2d 1336, 1343 (5th Cir. 1993) (Employer waived hearsay objection by failing to raise it at the administrative hearing.)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, February 11, 2004, at San Francisco, CA.

Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.